HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5514 OF 2004.

1.Sandeep Ramesh More,
2. Pravin Ramesh More.
3. Sundarbai Ramesh More. ..Petitioners.

Versus.

1.Narayan Deoba More
2.Narhar Deoba More,
3.Nirmal Damodhar Mahajan.
4. Gangabai Ramesh Khairnar. ..Respondents.

Shri. A. H. Palekar for the Petitioners.

Shri. A. R. Shaikh for the respondent No.2.

CORAM: S.B.MHASE, J.

DATE : MARCH 16, 2006.

Oral Judgment (Per S.B.Mhase,J).

1. Heard. Rule returnable forthwith by consent of both sides.

2. The petitioners have filed Special Civil Suit No. 43 of 2001 before the Civil Judge, Senior Division, Malegaon seeking partition and separate possession of the share of the petitioner which they inherited on the death of one Mr. Ramesh who was the husband of the petitioner no.3 and father of the petitioner nos. 1 and 2. The respondent nos.1 & 2

are the brothers of said Ramesh while the respondent nos. 3 & 4 are the sisters of said Ramesh. The suit property is joint family property in possession of the respondents. After filing of the suit, application Exhibit-5 was submitted under Order-XXXIX rule-2 of the Code of Civil Procedure, 1908 requesting the Court that during the pendency of the suit the respondent - original defendants shall be prohibited from transferring the suit property to any third person and/or prohibited from creating any encumbrance on the suit property. Another application at Exhibit -7 was filed requesting the trial Court to grant the maintenance at the rate of Rs.4,000/- per month, since the joint family property is in possession of the defendants - respondents. Both these applications were heard together and a common order was passed by the Civil Judge, Senior Division, Malegaon on December 2, 2002. By this order Civil Judge, Senior Division, Malegaon restrained the defendants - respondents from transferring the suit properties till final decision of the suit and further directed the defendants to pay interim maintenance at the rate of Rs.1,000/- per month to each of the petitioners from the date of the order till decision of the suit.

3. It is pertinent to note that Miscellaneous

Appeal No. 1 of 2003 was preferred by the respondent - defendants only as against the order passed below Exhibit-7. Thus, the order restraining the defendants - respondents from transferring the suit properties has obtained finality as against the respondent. Appeal as against the order passed below Exhibit- 7, namely the interim order for maintenance passed in partition suit was unfortunately entertained by the Additional District Judge, Malegaon and further on hearing both sides the order below Exhibit-5 was confirmed and the order of maintenance was modified and in stead of Rs.1000/- per month, maintenance was fixed at Rs.500/- per month in favour of each of the petitioners from the date of passing of the order. The said order is dated February 24, 2004 which is subject matter of this petition.

4. Learned Counsel appearing on behalf of the petitioner states that Miscellaneous Appeal bearing No. 1 of 2003 was directed as against the order passed below Exhibit-7 only and there was no appeal as against order passed below Exhibit-5. Learned counsel submitted that therefore it was an error on the part of the Appellate Court to confirm the order passed below Exhibit-5. He further submitted that the modification of the order passed in respect of the

interim maintenance is erroneous one since the order passed below Exhibit-7 was passed under section 151 of the Code of Civil Procedure, 1908 and not under Order-XXXIX, Rule 1 & 2 of the Code of Civil Procedure, 1908.

5. Learned counsel for the respondent tried to support the order in question.

6. When application under Order-XXXIX, rule 1 and rule 2 is disposed of an appeal as against the said order has been provided for under Order-XLIII. On perusal of the appeal memo, it is crystal clear that there was no appeal as against the order passed below Exhibit -5 and the appeal was only directed as against the order passed below Exhibit-7. The cause-title of the appeal is eloquently clear. Therefore, the submission of the learned counsel that there was a composite appeal is not tenable and is hereby rejected.

7. It is well settled that when an application for maintenance is submitted in partition suit by the plaintiff, in view of the fact that the property is in possession of the defendant and the plaintiff is entitled to have maintenance out of the joint family

property, such application is entertained and decided in view of the provisions of section 151 and not under Order-XXXIX or any other provision. Therefore, as against such order, the miscellaneous appeal is misconceived since Order-XLII is not applicable to such orders. Thus, this Court finds that the appeal as against the order of maintenance which was passed below Exhibit - 7 was not tenable in law. Therefore, order dated 24.2.2004 passed by the Additional District Judge, Malegaon is without any jurisdiction and power and requires to be set aside. Accordingly, it is set aside. Petition is hereby allowed in above terms.

(S.B.MHASE, J.)